# United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

# Advice Memorandum

DATE: April 30, 2010

TO : Stephen Glasser, Regional Director

Region 7

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Bullard Company

Case 7-CA-52500 177-8520-0100 177-8520-2400

177-8520-2400 177-8520-4700 177-8520-8050

The Region submitted this case for advice as to whether Gregory Green, a field foreman allegedly discharged because of his protected concerted and union activities, was a Section 2(11) supervisor. In applying the framework set forth in <a href="Oakwood Healthcare">Oakwood Healthcare</a>, <a href="Inc.">Inc.</a>, <a href="Inc.">Inc.</a>, <a href="Inc.">Inc.</a> we conclude that Green was a Section 2(11) supervisor because he had the authority to effectively recommend employees for assignment and to responsibly direct employees, utilizing his independent judgment. We further conclude that his role as a part-time or periodic foreman did not diminish his supervisory authority.

## FACTS

The Employer manufactures processed pipe, structural steel platforms and other steel fabrication products and provides industrial maintenance and construction services to manufacturing facilities throughout the United States.

Gregory Green began working for the Employer in July 2008, as a multi-craft (welder/pipefitter) employee. Over the course of the next year and a half, Green worked as a welder, foreman, and sub-foreman. Green worked as a foreman or a sub-foreman on several of the projects. From September through November 2008, Green was the foreman on phase 1 of the CertainTeed job. From November through December 2008, Green was a foreman for the Marathon job. From January through February 2009, Green worked as a sub-foreman on the Eftec job. From February through July 2009, Green worked as a welder at the Eftec job until he was laid off. In mid-August 2009, Green was recalled and assigned to be the foreman at phase 2 of the CertainTeed job, where he oversaw

<sup>1 348</sup> NLRB 686 (2006).

a three-man crew. Green remained the foreman on the job until his discharge on September 24, 2009.

In around July 2009, Green began talking with other employees about Local 50, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("Union") and its organizing efforts. On around September 18, 2009, while working as foreman for the CertainTeed job, Green scheduled a meeting outside of work at a local pool bar with some of the other employees to discuss the Union. On September 24, 2009, the Employer discharged Green for allegedly promoting a work slow down to prolong the length of the project after learning that he and his crew would be laid off once the project was completed. The Union contends Green was discriminatorily discharged because of his activities in support of the Union's organizing efforts.

The Employer has approximately 40 employees, including several foremen. All employees report to field superintendent Robert Edwards, who is responsible for estimating projects, monitoring productivity, handling safety matters, and overseeing personnel issues (e.g., hiring and firing, transfers between jobs, counseling and disciplining, documenting attendance and work hours, and collecting employee evaluations). Edwards spends 20 percent of his week out in the field, and the remaining 80 percent in the office.

The Employer assigns at least one field foreman to each job. Each foreman typically will oversee a crew of three or more employees. The crews usually consist of laborers, welders, and pipefitters. Depending on the job's size and complexity, the Employer may divide the employees into smaller crews and assign additional foremen or subforemen to oversee them. Green oversaw a three-man crew on the CertainTeed job and remained the foreman on the job until his discharge. Green was the highest ranking employee on the job at all times other than when Edwards would visit the site.

Depending on the size of project, the foremen may work alongside their crew. If the project is small, the foremen will perform hands-on labor in addition to their supervisory duties. If the project is larger, the foremen will perform no hands-on labor and only supervise. Regardless, all foremen have the same supervisory duties. Green worked alongside his crew for seven of the eight hours per day that he was on the CertainTeed project and spent an hour or so handling paperwork.

The "Foreman's Manual" contains a section listing the "Supervisory Duties" of foremen. The Manual states that, among these duties, each foreman has the authority to responsibly direct, assign, move or transfer any employees that are assigned to the foreman's job, based on the foreman's assessment of the present job(s) situation, employee needs, employee skills and other factors which, in the foreman's independent judgment, the foreman believes are relevant. The Manual also states that the foreman must inspect all work performed by the employees on the job and has the authority to order employees to correct their work in accordance with the foreman's independent judgment and assessment of their work. The foremen also are responsible for maintaining time records for the employees on their crew and logging in and out equipment used by crew members each day.

The evidence establishes that the foremen determine who will be assigned to work on their crew. After being assigned to a project, each foreman selects from a list of available workers who the foreman wants on the project. In doing so, the foreman assesses the employees' skills and abilities, and whether they meet the requirements of the particular project. Once the foreman makes the selections, the foreman informs Edwards, who will tell the selected employees where to report for work. There is no evidence that Edwards independently examines or overrules the foreman's choices. When serving as foreman, Green had the authority to request that particular employees be assigned to work on his crew.<sup>2</sup>

Similarly, when it comes to reducing the number of employees on a project, the foremen have the authority to recommend who remains and who is laid off or reassigned. In making their determinations, the foremen will consider each worker's qualifications, the work remaining to be done, and the progress of the job. The foremen then speak with Edwards about the need to cut back on personnel, tell Edwards who should remain and who no longer is needed, and Edwards will inform the foreman to verbally notify the workers when they are no longer needed on a job. There is no evidence that Edwards independently examines or overrules the foreman's choices. For instance, after Green's termination, the foreman who replaced him

<sup>&</sup>lt;sup>2</sup> While Green does not explicitly indicate that he exercised the authority to choose crew members, other record evidence indicates that the foremen did in fact exercise this authority.

recommended that one of the three employees be laid off, and Edwards followed that recommendation.

A foreman also is responsible for reviewing the project plans and assigning tasks to those on the crew. These assignments are made based upon the foreman's independent assessment of the skills and abilities of the employees on his crew, and the needs of the particular project. The foreman is responsible for inspecting the work of those on the crew. If the work is not done properly, the foreman is to instruct the employee to redo or correct the work.

As a foreman, Green regularly directed employees on his crew in their work. For example, he would tell a welder or millwright on his crew that he/she needed to build or weld a piece, or he would tell the laborer(s) on his crew to move materials, do cleanup, move tools to another workstation, etc. Green made such assignments based on his assessment of the individual's skills and ability. He also was responsible for inspecting their work. If the job was not done properly, Green would tell the employee to correct or re-do the job.

Upon the "successful" completion of a job, the foremen assigned to it receive a Job Adder Increase of \$2.50 an hour for each hour they worked on the job. A "successful job" is one that: (1) has no major injuries; (2) the customer and field superintendent are satisfied with the quality of the project; (3) the job has been completed and the man hours used are no more than 10 percent over the man hours estimated; (4) all tools and equipment have been turned in and inspected for damage; and (5) trucking time has been kept to a reasonable amount. This Job Adder Increase is only available to foremen and sub-foremen, and it is paid quarterly. Green received Job Adder Increases for projects for which he was a foreman or sub-foreman.

Foremen also complete evaluations for those working on their crews. Edwards collects the evaluations. Wage increases are discretionary based upon how the Employer is doing financially. Green completed evaluations of two employees during his employment. Employees receive raises based on their performance, but it is not clear if the employees that Green evaluated received or did not receive raises based on his evaluations.

The Employer also gave Green a gas credit card, a company cell phone, and expense checks.

#### ACTION

We conclude the charge should be dismissed because Green was a supervisor within the meaning of Section 2(11) based upon his authority to effectively recommend employees for assignment and to responsibly direct employees.

As the Board clarified in <u>Oakwood Healthcare</u>, <u>Inc.</u>, <sup>3</sup> individuals are statutory supervisors if: (1) they hold the authority to engage in any one of the 12 supervisory functions listed in Section 2(11); (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment"; and (3) their authority is held "in the interest of the employer." In <u>Oakwood Healthcare</u>, the Board held that for the judgment to be independent, it must be "free of the control of others" and not be "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement."<sup>4</sup>

## Authority to Effectively Recommend Assignment

In <u>Oakwood Healthcare</u>, the Board construed the term "assign" "to refer to the Act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e. tasks, to an employee." The term did not encompass "choosing the order in which the employee will perform a discrete task" or "ad hoc instruction that the employee perform a discrete task."

As a foreman for the Employer, Green had the authority to effectively recommend employees for assignment. Green's ability to select his crew from the list of available employees based upon his independent assessment of their skills and abilities demonstrates his authority to effectively recommend an employee's assignment to a place, time or to significant overall duties. The fact that Edwards did not disregard, independently review, or

 $<sup>^{3}</sup>$  <u>Id</u>. at 693.

<sup>4</sup> Id.

<sup>5</sup> <u>Id</u>. at 689.

<sup>6</sup> Id.

 $<sup>^{7}</sup>$  See <u>id</u>.

overrule the foreman's selection establishes that the foremen "effectively recommend" assignments.  $^{8}$ 

Similarly, Green's authority to effectively recommend individuals for layoff when reductions are necessary also demonstrates his authority. The foremen's assessment of the workers' qualifications, the work remaining to be done, and the progress of the job, in determining who should remain and who is no longer needed demonstrate that such authority was exercised with independent judgment.

Based upon the foregoing, the foremen, including Green, have the authority to effectively recommend assignment of employees based on their independent judgment.

### Responsibly Direct

With regard to "responsibility to direct," the Board in Oakwood Healthcare held "if a person on the shop floor has 'men under him' and if that person decides 'what job shall be undertaken next or who shall do it,' that person is a supervisor, provided that the direction is both 'responsible'. . . and carried out with independent judgment." To be responsible direction, the alleged

<sup>&</sup>lt;sup>8</sup> While Green does not explicitly acknowledge exercising this authority, he possessed the authority, and there is evidence that other foremen do regularly exercise their authority to effectively recommend assignment. See <u>Avante at Wilson</u>, 348 NLRB 1056, 1057 (2006) (Section 2(11) only requires possession of authority to carry out an enumerated supervisory function, not its actual exercise, as long as the evidence shows that such authority actually exists and that its exercise requires the use of independent judgment.) Further, the Region's investigation indicates that Edwards conducted no independent review of the foremen's request for particular crewmembers.

<sup>9 &</sup>lt;u>Id.</u> at 691, quoting legislative history. See <u>Sutter</u> <u>Health Pacific d/b/a Kahi Mohala Behavioral Health</u>, Cases 37-CA-7309 et. al., Advice Memorandum dated January 28, 2008, discussing <u>Croft Metals</u>, <u>Inc.</u>, 348 NLRB 717, 721-22 (2006) ("in a manufacturing setting, lead persons who worked along side their crew members engaged in 'direction' rather than assignment where they occasionally switched tasks among the employees, directed employees to ensure that projects were completed on a timely basis, and told replacements what jobs to perform and switched other employees' jobs accordingly. The occasional switching of jobs among employees "more closely resemble[d] an 'ad hoc

supervisor "must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." The Board also said, "[I]t must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." 11

In <u>Golden Crest Healthcare</u>, <u>Inc.</u>, <sup>12</sup> the Board held that, in determining whether accountability has been shown, there "must be evidence that a putative supervisor's rating for direction of subordinates may have, either by itself or in combination with other performance factors, an effect on that person's terms and conditions of employment." <sup>13</sup> "Such an effect may be positive—such as, for example, a merit increase, bonus, or promotion—or negative—such as, for example, the denial of one or more of the foregoing, or some form of counseling or discipline." <sup>14</sup>

As a foreman for the Employer, Green had the authority to direct employees. Green exercised this authority on a daily basis when assigning tasks to those on his crew. For example, he directed the welders/millwrights to build or weld pieces, and directed the laborers to move materials, do cleanup, and move tools to another location. <sup>15</sup> Green made

instruction that the employee perform a discrete task' during the shift" than it did the assignment of significant overall duties).

<sup>10</sup> Oakwood Healthcare, 348 NLRB at 692.

<sup>11 &</sup>lt;u>Id</u>.

<sup>12 348</sup> NLRB 727, 731 (2006).

<sup>13</sup> Id.

<sup>14 &</sup>lt;u>Id</u>. at 731 fn. 13. See also <u>Bally's Park Place Casino</u>, Case 4-CA-35469, Advice Memorandum dates October 11, 2007 (lead person's rating for his ability to direct was considered in completing his annual performance evaluation, which was used to determine whether he received a wage increase).

<sup>15</sup> See Loparex LLC, 353 NLRB No. 126, slip op. at 13 (2009) (shift leaders directed employees where they spent significant time overseeing work even though they also operated machines).

these decisions based upon his assessment of the employees' individual skills and abilities. Green also reassigned employees to other tasks on the project, after making assessments regarding their skills and abilities, as well as the needs of the project. <sup>16</sup> Moreover, Green was responsible for inspecting the work of his crew to make sure it was done properly. If he determined that the job was not done properly, he would tell the employee to redo the job. Green made these decisions on his own, without needing to consult with or get prior approval from a superior.

Green was held accountable for the work of his crew in that his conditions of employment were affected positively based on his direction of subordinates. If Green's crew successfully completed its job, Green would receive a Job Adder Increase of \$2.50 an hour for every hour he worked on the job. There is a direct correlation between Green's directing of the employees on his crew and the project's "successful" completion: (1) foremen are responsible for enforcing the Employer's safety policies and procedures, thereby making sure that the project has no major injuries; (2) foremen are responsible for assigning tasks based upon their assessment of the employees' skills and abilities, inspecting their work, and, if necessary, instructing the employees to correct or redo the work, thereby improving customer and field superintendent satisfaction with the quality of the project; (3) foremen are responsible to recording employee hours and determining when fewer employees are needed, thereby affecting whether the job has been completed within the estimated man hours; (4) foremen are responsible for distributing and documenting tools and equipment, thereby ensuring that they are returned and undamaged; and (5) the foremen are responsible for assigning tasks to employees, thereby influencing whether trucking time has been kept to a reasonable amount. 17 Thus

<sup>16</sup> See PPG Aerospace Industries, Inc., 355 NLRB No. 18 (2010) (adopting judge's finding that lead persons were supervisors because they have the ability to and do make changes to work assignments, and prioritize those assignments to make sure production needs are met, even though the lead persons do so only after receiving approval from their supervisors) (citing USF Reddaway, Inc., 349 NLRB 329 (2007) (holding that lead persons who made changes in task or job assignments based on the employer's needs were supervisors); and American River Transporting Co., 347 NLRB 925 (2006) (holding that authority to change and prioritize work assignments required a finding of supervisory status)).

Green's bonus is directly tied to his successful direction of the project, making him accountable for the work.

There is no evidence that the foremen's authority to direct is circumscribed or limited by detailed instructions. They are assigned the project and responsible for directing their crew based upon judgment and discretion. Accordingly, Green responsibly directed his crew using independent judgment. 18

# Part-time or Periodic Supervisors

Under <u>Oakwood Healthcare</u>, where an individual is engaged part of the time as a supervisor, the legal standard in determining supervisory status is whether he/she "spends a regular and substantial portion of his/her work time performing supervisory functions." <sup>19</sup> The Board has held that "regular" means according to a pattern or schedule, as opposed to sporadic substitution. <sup>20</sup> While the Board has not adopted a strict numerical definition of substantiality, it has found supervisory status "where the individuals have served in a supervisory role for at least 10-15 percent of their total work time." <sup>21</sup>

Here, Green spent at least a third of his employment with the Employer acting as a foreman or sub-foreman, which is well above the 10-15 percent the Board has held to be sufficient to constitute substantial. Further, there is no evidence that Green's supervisory authority was diminished in any way because he served as an employee or previous

 $<sup>^{17}</sup>$  Cf. Rockspring Development, Inc., 353 NLRB No. 105, slip op. at  $\overline{2}$  (2009) (accountability not shown where safety coordinator would "hear about it" if employer received safety violation).

<sup>18</sup> As a foreman, Green also completed evaluations of those working on his crew, but it is unclear whether those evaluations were used to either grant or withhold wage increases. Where an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. See Williamette Industries, Inc., 336 NLRB 743 (2001).

 $<sup>^{19}</sup>$  Oakwood Healthcare, 348 NLRB at 694.

<sup>20 &</sup>lt;u>Id</u>.

<sup>21</sup> Id.

projects. 22 Accordingly, Green's part-time or periodic supervisory status did not diminish his supervisory authority.

Because we conclude that Green was a statutory supervisor, the Region should, absent withdrawal, dismiss the allegations concerning his discharge.

B.J.K.

 $<sup>^{22}</sup>$  See G.C. Memorandum 07-05 (noting that inherent in the nature of part-time supervision is the possibility that the employer has not given supervisory authority to the individual, but retained the authority in that individual's supervisors).